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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 318

JOHN A. BURNS, Governor of the State of Hawaii, *Appellant*,

v.

WILLIAM S. RICHARDSON, ET AL., *Appellees*.

No. 323

ELMER F. CRAVALHO, et al., *Appellants*,

v.

WILLIAM S. RICHARDSON, et al., *Appellees*.

Appeal from the United States District Court for the District of Hawaii

Amicus Curiae Brief in Opposition to
JURISDICTIONAL STATEMENT
~~Amicus Curiae~~

HAROLD S. ROBERTS
Petitioner

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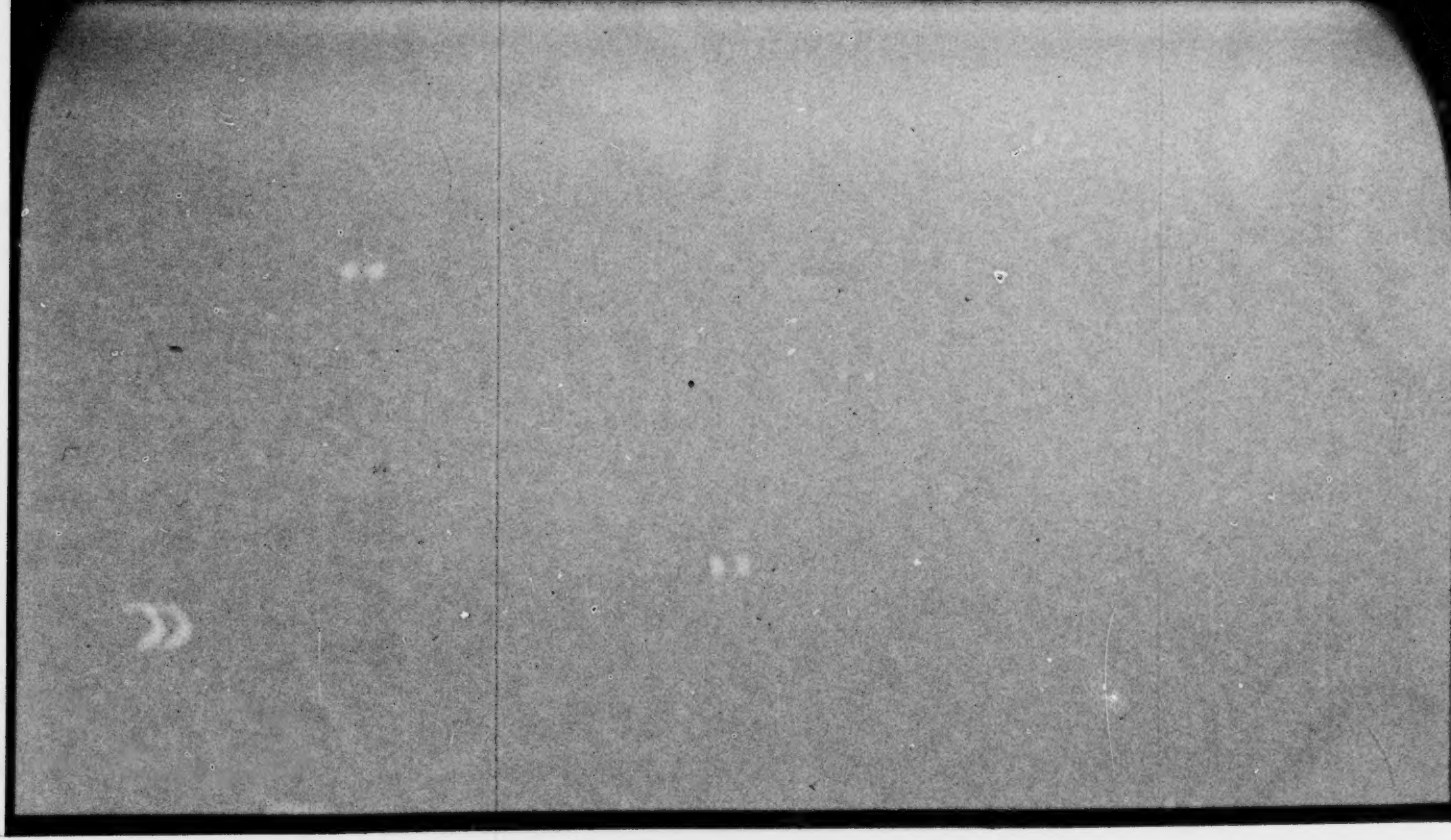
July 1965



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JURISDICTIONAL STATEMENT
Amicus Curiae

Section I. Opening Statement:

Your Petitioner, Harold S. Roberts, Citizen of the State of Hawaii, urges the dismissal of Appellants appeal from the U. S. District Court for the District of Hawaii. The brief amicus is submitted to show that the Appellants have filed a timely appeal only to the April 28 decision of the U. S.

District Court, which relates to procedures for amending the Hawaii State Constitution. The only issue before this Court is the procedure for effecting changes in the Hawaii State Constitution to conform to the June 15, 1964 reapportionment decisions of this Court (Reynolds v. Sims, 377 U. S. 533 [1964], and the companion cases).

It is the belief of your Petitioner that this question is a local question already disposed of by the Hawaii State Supreme Court (Guntert v. Richardson, 394 P. 2d 444 [Haw. 1964]) and affirmed by the District Court (Holt v. Richardson, Civil No. 2308, Feb. 17, 1965, Appellant Burns' Brief Appendix A and Cravalho Brief Appendix A, pp. 17a-39a). In the absence of any substantial Federal question, the order of the District Court should be affirmed.

Section II. Jurisdiction:

Your petitioner is of the opinion that the appeals in Nos. 318 and 323 are not timely filed, except as to item 4 and 6 of the District Court Order and Decree of February 17, 1965 (Jurisdictional Brief No. 318, Appendix A, pp. 19a and 19b). The District Court "Final Order on Motion to Alter or Amend Judgment" of March 9, 1965 makes this abundantly clear (Jurisdictional Brief in No. 318, Appendix B, pp. 21a-32a).

The March 9 Final Order of the District Court resulted from a legislative request in the form of Senate

Concurrent Resolution No. 35 adopted by the Senate and House on March 1, 1965, and not opposed by any of the parties, to permit the Legislature to draft a reapportionment plan for the mal-apportioned Senate for approval by the District Court. No appeal was taken by any of the parties to the March 9, 1965 order.

It appears clear from the Record and the action of the parties to the Suit that they were in agreement that the only remaining problem was the reapportionment of the Senate. The brief submitted jointly to the Court below by Intervenors-Defendants Cravalho and Doi, for the House and Senate, dated March 5, 1965, supports this contention. It states in part:

"It is clear that if the legislature had proposed Constitutional Amendments providing for a constitutionally reapportioned legislature at the special session, the ratification could have been had in the general election of 1964 so that a constitutionally valid reapportioned legislature could be elected in the general elections of 1966. Having missed its 'opportunity' at the special session, the legislature was ordered by this court to amend the Constitution to provide for a constitutionally valid reapportioned senate by the only remaining method provided for in the Constitution--by way of a Constitutional Convention....While intervenors-defendants generally subscribe to

the validity of the theories and policy of the Court in the Decision and Order,...."

They asked the court to permit the legislature to present a plan which the court could submit as its own. This the Court did.

Your petitioner submits that the District Court's acquiescence to the parties (including the Governor) was permissive in nature. When the legislature failed to come up with a plan acceptable to it under sections 4 and 6, the Court in its April 28, 1965 order withdrew the permission it granted on March 9, 1965, and reinstated items 4 and 6 of the February 17, 1965 order.

The District Court order of March 9, 1965, indicates specifically that no controversy existed among the parties, that the only issue to be resolved was the "formulation of a plan for reapportioning the Senate which can be Constitutionally justified." The District Court said in part:

"Based upon the current actions of the legislators, followed by the representations by counsel for all parties to this suit that all are in accord with the objectives outlined in the motion to alter or amend judgment, this court is now convinced that the legislative climate has changed and that the legislators presently in session are now prepared to undertake the formulation of a plan for reapportioning the Senate which can

be Constitutionally justified...."
(Emphasis added)

The same agreement among all the parties is to be found when the legislature submitted its proposed plan for reapportioning the Senate. Neither of the Appellants in No. 318 or 323 raised any questions or opposition before the District on the proposed Senate Reapportionment plan. Your petitioner urges this Court to consider that none of the issues now raised as presenting Substantial Questions to justify probable jurisdiction, were raised before the District Court by either Appellants in Nos. 318 or 323. The questions now raised have been resolved either by the District Court in its February 17, 1965 decision or in the decision of the Hawaii State Supreme Court on July 27, 1964.

Appellants appear to rest their claim of a timely Appeal on the ground that the February 17, 1965 Order, was "filed" on February 17, 1965, but was not "entered" until April 9, 1965, some 7 weeks later. They offer no reasons for the delay in "entry", except possibly an oversight on the part of the Clerk of the District Court. There is no entry on the Docket (Civil Docket No. 2308) or order of the District Court to stay or postpone entry of its Order. The April 28, 1965 Decision and Order was filed and entered on the same day, April 28th. As a practical matter all parties received the February 17, 1965 Decision and Order. The petition of

all parties which led to the Mar
Order makes this abundantly clea

Your Petitioner is somewhat av
to raising a technical, procedur
question - particularly if it wo
deprive any party of his rights,
lead to any inequity. Under the
cumstances of this proceeding he
lieves that equity would be best
served by raising all legitimate
questions to assure the citizens
this State their Constitutional
rights, rights under their State
Constitution -- not in conflict
the U. S. Constitution or the Su
Court decisions of June 15, 1964

Your Petitioner submits that
changes in the Hawaii State Cons
tution can be made only in the m
set out by the document itself --
Article XV. That article, as th
Proceedings of the Constitutiona
vention will amply support, was
written with the experience of m
than 40 years of failure by legi
tures of the Territory of Hawaii
reapportion in accordance with t
Organic Act of April 1900. Sect
of the Organic provided in part

*"The legislature, at its first
gular session after the census
enumeration shall be ascertain
and from time to time thereaft
shall reapportion the membersh
in the senate and house of rep
tatives among the senatorial a
represenative districts on the
basis of the population in eac
said districts who are citizen
the Territory."* (Emphasis adde

No reapportionment took place - there were always explanations why it couldn't be done!

When the delegates wrote the State Constitution they made it clear that the legislature would have no responsibility in reapportionment. They also wrote the district boundaries into the Constitution. They did give the legislature authority to propose constitutional amendments, subject to approval of the people, by referendum, prior to effectuating any changes in the Constitution. What is being proposed now by Appellants is to vitiate the provisions of the Constitution, by usurping the right of the people to determine the structure of their government. The suggestion that Legislative Reapportionment be put into effect as the Courts' plan, is a transparent subterfuge -- a legal fiction to subvert the clear language of the State Constitution. Equally obnoxious to the State Constitution is the contention that the people be given the opportunity to vote on a Constitutional Amendment after the "temporary" statutory plan is put into effect. This is no real choice. Should the people vote the amendment down, the individuals elected to office -- under their own plan, would still hold office for at least two years, until the next general election.

It should be noticed that the legislature which urges that it has "plenary" or "inherent" powers is mal-apportioned under the June 15, 1964 cases.

SECTION III. Question Presented.

The only question is whether it was an error for the District Court to have decreed that the Legislature of Hawaii shall adopt legislation, pursuant to Article XV of the Constitution of the State of Hawaii, providing for submission to the people of Hawaii the question "Shall there be a convention to prepare a revision of or amendments to the Constitution?" "and for any and all acts required by law to implement such legislation, and further providing in the event of an affirmative vote, for election of delegates to a constitutional convention and for an election on any proposed amendments adopted by the constitutional convention, said amendments including, but not limiting the convention thereto, provisions reapportioning the Senate of Hawaii on a constitutionally valid basis."

We believe that the issue in this respect is clear. The Supreme Court of Hawaii in its decision of July 27, 1964 said in part:

"In the light of the decisions handed down by the United States Supreme Court on June 15, 1964, we take cognizance of the indisputable invalidity of Article III, section 2 of the State Constitution, relating to the composition and apportionment of the State Senate. The problems thus raised will be considered first from the standpoint of permanent reapportionment and then from the standpoint of a temporary reapportionment plan.

"At least in the initial stages of the problem presented by the invalidity of this provision, the question whether such invalidity can be cured by act of the legislature itself, or requires an amendment of the State Constitution, is one of local law, not federal constitutional right. We note that the Supreme Court has said that 'the delay inherent in following the state constitutional prescription for approval of constitutional amendments *** cannot be allowed to result in an unpermissible deprivation of [the] right to an adequate voice in the election of legislators ***.' Roman v. Sincock, supra. But that was said in a case where, at the time of rendition of the Supreme Court opinion, the case had been pending for two years during which a constitutional amendment had been achieved but had proved invalid. We see no indication that the matter of the machinery to be used to cure the invalidity of the Senate plan presents a federal question at the inception of Hawaii's efforts in that direction....The point now of importance is that the quoted provision as to a majority vote in a majority of the counties should prove to be unconstitutional, that would not render invalid the requirement that the change be by constitutional amendment."

The District Court in its decision of February 17, 1965, agreed with the Supreme Court of Hawaii. It said in part:

> *"As pointed out by the Supreme Court of Hawaii....any change in the representation from any senatorial district must be by constitutional amendment. This court concurs!"*

We believe that a review of the Hawaii State Constitution and the Proceedings of the Constitutional Convention, dealing with the section on Revision and Amendment (Article XV) and the Procedures for Reapportionment, makes it abundantly clear that the Constitution of Hawaii, for reasons clearly set out in the Debates of the Convention, eliminates Legislative Responsibility in apportionment or reapportionment--except for proposing a Constitutional amendment for prior approval by the people in a referendum. This provision is unique among the 50 States of the Union.

Your petitioner believes that the rights of the people of the State under their Constitution should not be altered by a legislative (statutory) reapportionment, and that the plain requirements of the State Constitution as construed by the Hawaii Supreme Court and concurred in by the Court below should be upheld.

SECTION IV. Statement of the Case:

Your petitioner submits to this Court that there is no real case or controversy on the question of the constitutionality of the provisions regarding the Hawaii Senate. Everyone has agreed on their invalidity in light of the Supreme Court Decisions on June 15, 1964. As stated in the February 17, 1965 District Court decision:

"All parties before this court conceded (as was also determined by the Supreme Court of Hawaii in Guntert v. Richardson, 47 Hawaii ___ (July 27, 1964) that Article II, Section 2, relating to the composition and apportionment of the State Senate is indisputably invalid under Reynolds v. Sims, supra).

The record also shows that appellants supported the legislation submitted to the District Court pursuant to the March 9th order, and that this legislation sought to deal only with the Senate. Since the parties are in agreement as to the issue and did not object to the presentation of the Senate plan, it is hardly proper for them to now claim that a controversy exists on matters other than the Senate.

The only real issue then is whether the Hawaii Legislature must handle the matter of Senate Reapportionment in accordance with the provisions of the Hawaii State Constitution. This,

petitioner contends, is a matter of local law which has already been determined by the Hawaii Supreme Court in Guntert v. Richardson, supra, a decision from which no appeal was taken.

Section V. The Questions Presented Are Not Substantial:

This appeal presents no substantial question. As shown above, all parties to the litigation (1) agreed that the present constitutional provisions regarding the Senate violate the due process and equal protection clause of the 14th Amendment of the United States Constitution, and (2) supported the legislation for the temporary reapportionment of the Senate only. The controversy, then, is over the procedure for reapportioning the Senate, not the necessity for doing so, or the merits or demerits of such a plan.

The procedure for amendments and revision of the State Constitution is set forth in Article XV of the Constitution of Hawaii and this procedure must be followed. The decision of the Supreme Court of Hawaii and the Court below have fully, fairly and adequately decided this issue and determined complete guidelines for a Plan of constitutional reapportionment which meets the requirements of the 14th Amendment and the decisions of this Court and the State Constitution.

Section VI. Conclusion.

For the foregoing reasons the appeals should be dismissed and the order below affirmed.

Respectfully submitted,

Harold S. Roberts
Petitioner

Richard K. Sharpless
Counsel

July 1965